

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 29, 2005

JEFFREY SHAWN WILLIAMS v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Knox County
No. 80520 Mary Beth Leibowitz, Judge

No. E2005-00723-CCA-R3-PC - Filed May 19, 2006

Petitioner, Jeffrey Shawn Williams, filed a *pro se* petition for post-conviction relief attacking his convictions in Knox County Criminal Court in case number 69596. He pled guilty to aggravated kidnapping and rape of a child. The trial court entered an order summarily dismissing the petition for post-conviction relief. The basis for the dismissal was twofold: the petition was filed beyond the statute of limitations, and the allegations of the petition alleged “no constitutional ground for violation [of] the rights of the defendant.” After a careful review of the record, we reverse the judgment of the trial court and remand this case for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court Reversed and Remanded

THOMAS T. WOODALL, J., delivered the opinion of the court, in which GARY R. WADE, P.J., and JOSEPH M. TIPTON, J., joined.

Jeffrey Shawn Williams, *pro se*.

Paul G. Summers, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; and Randall E. Nichols, District Attorney General, for the appellee, the State of Tennessee.

OPINION

In addition to alleging that his sentences violated his constitutional right to have sentencing enhancements found by a jury, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), Petitioner also alleged that he had ineffective assistance of counsel. In support of this claim, Petitioner stated that his counsel (1) abandoned his appeal of his sentences; (2) never attempted to develop a theory of defense to his charges; and (3) did not fully investigate any of the criminal charges pending against Petitioner.

In order to dispose of this appeal, it is necessary to conduct a detailed review of the history of Petitioner’s Knox County Criminal Court charges of aggravated kidnapping and rape of a child in case number 69596. Petitioner pled guilty to both charges and entered into an agreement with the

State that the sentences would be served concurrently, with the trial court to determine the length of the sentences. A sentencing hearing was held on July 7, 2002. The trial court ordered the maximum sentence of twenty-five years for each conviction, to be served concurrent with one another. On July 31, 2002, Petitioner, through counsel, timely filed a Notice of Appeal with the trial court clerk. The Notice of Appeal was filed with the appellate court clerk on August 2, 2002.

On August 15, 2002, Petitioner entered into another agreement with the State to dispose of various unrelated charges pending in the Knox County Criminal Court. This agreement provided that Petitioner would waive his appeal in the rape of a child and aggravated kidnapping convictions in case number 69596 in exchange for the State's dismissal of other pending charges, including aggravated burglary. The State also agreed to reduce other felonies to misdemeanors and to allow some sentences to be served concurrently with the effective twenty-five year sentence in case number 69596.

Petitioner did not promptly file a motion to voluntarily dismiss the pending appeal in case number 69596. Despite the fact that the State was to receive the benefit of Petitioner withdrawing his appeal pursuant to the August 15, 2002 plea agreement, the State did not file any motion or otherwise follow-up on the status of Petitioner's appeal in case number 69596.

On February 26, 2003, Petitioner's counsel of record in case number 69596 filed a pleading in this court styled as "Notice of Withdrawal of Appeal." This pleading states in total:

Defendant, Jeffrey Shawn Williams, by and through his counsel, hereby gives notice of the withdrawal of the appeal he made from the Knox County Criminal Court (original case number 69596) to the Tennessee Court of Criminal Appeals.

On March 18, 2003, this Court entered an order that treated the pleading as a motion for voluntary dismissal of the appeal, a process governed by Rule 15(a) of Tennessee Rules of Appellate Procedure and Rule 11 of the Rules of the Tennessee Court of Criminal Appeals. This Court's order denied the motion to voluntarily dismiss the appeal, without prejudice, because there was no statement signed by the Petitioner that he had been advised of his rights regarding the appeal and that he expressly waived these rights as per Rule 11 of the Rules of this Court.

Notice of this order was presumably sent to the State and to Petitioner's counsel. Significantly, there was nothing in the "Notice" to indicate that Petitioner was withdrawing the appeal due to the terms of a negotiated plea agreement in unrelated cases in the Knox County Criminal Court. Nothing else, including the filing of the appellate record, occurred in the appeal until May 5, 2003, at which time this Court entered another order. That order required that by May 15, 2003, Petitioner's counsel either (1) file a motion for permission to late-file the record or give notice that no transcript or statement of the evidence was to be filed, or (2) file an appropriate motion to voluntarily dismiss the appeal in compliance with the applicable rules. The order further stated that failure to comply could result in the involuntary dismissal of the appeal and contempt proceedings against counsel.

On May 15, 2003, there were two filings in Petitioner's appeal. One was a "Motion for Waiver of '[Petitioner's] signed Statement' Requirement of Rule 11, Tennessee Court of Criminal Appeals, Relative to Voluntary Dismissal," filed by Petitioner's counsel. The other was a "Stipulation of Dismissal" of the appeal, signed only by Petitioner's counsel and an Assistant District Attorney General of Knox County. Attached to the "Stipulation of Dismissal" was a transcript of the "August 15, 2002 Submission and Waiver of Appeal." Page ten of the transcript reflects that Petitioner understood he was "agreeing to waive or give up [his] appeal" in case number 69596 as part of the plea agreement. The "Stipulation of Dismissal" states as follows:

The [Petitioner] and the State, parties in this action, stipulate that this appeal is, and should be, dismissed. Further, the parties submit that the dismissal of this appeal was part of a plea bargain of other cases, which were resolved on August 15, 2002, in the Criminal Court for Knox County in case numbers 68003, 67724 and 68002. A copy of the transcript of that "Submission and Waiver of Appeal" is attached as Exhibit A to this Stipulation of Dismissal.

This stipulation represents the first time this Court was given notice that dismissal of the appeal in case number 69596 was pursuant to a negotiated plea agreement. Again, Petitioner did not sign any statement pursuant to Rule 11 of the Rules of the Tennessee Court of Criminal Appeals regarding the "Stipulation of Dismissal." On June 24, 2003, Petitioner's counsel filed a pleading styled "Notice of Withdrawal of 'Motion for Waiver of [Petitioner's] signed statement.'" The pleading does not indicate that Petitioner's counsel sent notice of this pleading to the State.

On June 26, 2003, Petitioner's counsel filed an *Anders* brief, pursuant to Rule 22 of the Rules of the Tennessee Court of Criminal Appeals. The brief alleged that the appeal of the length of Petitioner's sentence in case number 69596 was frivolous because Petitioner entered a negotiated plea agreement on August 15, 2002, wherein Petitioner waived his right to appeal in consideration of concessions made by the State in unrelated cases. *See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). Counsel also moved to withdraw from the case on appeal. Pursuant to Rule 22(E) of the Rules of the Tennessee Court of Criminal Appeals, Petitioner filed a *pro se* brief on October 13, 2003, after being granted an extension to do so.

In his *pro se* brief, Petitioner argued that he had received an effective sentence of twenty-nine years rather than twenty-five years as stipulated in his negotiated plea agreement. He submitted a Tennessee Department of Correction TOMIS notice that a four-year sentence for a burglary conviction had been wrongfully ordered to run consecutively, rather than concurrently, with his effective sentence of twenty-five years.

On October 27, 2003, a panel of this Court entered an order pursuant to Rule 20 of the Rules of the Tennessee Court of Criminal Appeals as it then existed. The order (1) granted counsel's motion to withdraw and (2) affirmed the judgment of the trial court in case number 69596. In that order, a panel of this Court concluded that the TOMIS document submitted by Petitioner showed that the burglary conviction with the four-year consecutive sentence was a conviction imposed in 2000,

two years before the August 15, 2002 negotiated plea agreement, and therefore not a part of the August 15, 2002 plea agreement.

On October 6, 2004, within one year of this Court's October 27, 2003 order, Petitioner filed his *pro se* Petition for Post-Conviction Relief in the Criminal Court of Knox County. It is that petition which is the subject of this appeal. As stated above, Petitioner alleged that his trial counsel had rendered ineffective assistance of counsel, and that his constitutional right to have a jury determine sentencing enhancement was violated. The Knox County Criminal Court, Judge Ray L. Jenkins, entered an order requiring the guilty plea hearing to be transcribed and filed, and the court assigned the post-conviction case to another division of the Knox County Criminal Court. On February 25, 2005, the post-conviction court entered an order summarily dismissing the Petition for Post-Conviction Relief, reasoning that the petition failed to state a colorable claim. Specifically, the post-conviction court's order stated as follows:

PRELIMINARY ORDER
(NO COLORABLE CLAIM)

After examination of the petition for post-conviction relief together with the files, records, transcripts and correspondence relating to the judgment under attack, this court finds as follows:

(1) The petition shall be dismissed.

(2) The petition shall be dismissed based for failure to assert a colorable claim based on the following findings of fact:

The petitioner is outside the statute of limitations. The submission in this case having been by guilty plea on May 20, 2002, to rape of a child [sic].

(3) The findings of fact require dismissal based on these conclusions:

The allegation meets no constitutional ground for violation [of] the rights of the defendant who entered into the plea on May 20, 2002, attached hereto and incorporated herein by reference. Blakely v. Washington, [542 U.S. 296, 124 S. Ct. 2531] (2004), does not apply on collateral appeal.

The Clerk shall provide a copy of this order to the petitioner, and to the Knox County District Attorney General.

ENTER this the 24th day of February, 2005.

The post-conviction court did not address Petitioner's allegations that he received ineffective assistance of counsel. On March 21, 2005, Petitioner filed a timely *pro se* Notice of Appeal from the post-conviction court's dismissal of his petition.

On April 6, 2005, Petitioner filed a "Motion to Reconsider for Post-Conviction." In that motion, Petitioner asserted that his appeal in Knox County Criminal Court case number 69596 was not finally disposed of in the Court of Criminal Appeals until October 27, 2003, and therefore his petition for post-conviction relief was timely filed within the applicable one year statute of limitations. T.C.A. § 40-30-102(a) (2003).

On May 10, 2005, the post-conviction court entered an order denying the motion to reconsider. This order correctly notes that the post-conviction court had lost jurisdiction of the post-conviction proceeding because Petitioner had already filed a Notice of Appeal from the summary dismissal of the petition. The May 10, 2005 order states in full:

ORDER

In this cause, Jeffrey Shawn Williams, has filed a motion to reconsider for post conviction in docket number 80520 which was a case in which he entered a plea of guilty to the offense of rape of a child [sic]. He appealed stating that the order regarding defendant's counsel's motion to withdraw pursuant to Rule 22 of the Tennessee Court of Criminal Appeals put down on October 27, 2003, makes his post conviction petition filed on October 26, 2004, timely. However at an August 15, 2002, hearing in exchange for the defendant pleading guilty to a number of offenses, he waived his appeal in this case and as a result he received a considerable benefit on other charges. Therefore no actual appeal was filed and the ruling of the trial court is the final action taken in this case. Even though there was not an appeal filed the Court of Criminal Appeals, in that order regarding leave to withdraw the Appellate Court affirmed the courts rulings in the trial court. Further Mr. Williams's issues are either not applicable to post-conviction relief or have already been dealt with in a prior ruling. Further Mr. Williams has already filed an appeal to the original ruling of this court dismissing his post conviction petition, therefore the court has no jurisdiction, the motion to reconsider is respectfully denied.

Because the post-conviction court lost jurisdiction upon Petitioner's filing of the Notice of Appeal, the order entered on May 10, 2005, has no legal significance. However, the additional findings of the post-conviction court shed some light upon the post-conviction court's basis for summarily dismissing the petition. Specifically, the post-conviction court erroneously found that "no actual appeal was filed" by Petitioner from his sentence in case number 69596. The record indicates that the notice of appeal was filed on July 31, 2002, and, as in the post-conviction case, the trial court lost jurisdiction over case number 69596 when Petitioner filed his Notice of Appeal in that case.

Tennessee Code Annotated section 40-30-102(a) provides guidelines for when a prisoner may petition for post-conviction relief. The statute provides in pertinent part, “[e]xcept as provided in subsections (b) and (c), a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of such petition shall be barred.” T.C.A. § 40-30-102(a).

The legislature explicitly stated when the one year statute of limitations for the filing of a post-conviction petition begins to run. If an “appeal is taken,” the statute begins to run from “the date of the final action of the highest state appellate court” to which the appeal is taken. Only if no appeal is taken does the statute begin to run from the date on which the judgment of the trial court became final.

The statute does not provide an exception for an appeal which is taken, but which later is supposed to be voluntarily dismissed by a defendant pursuant to a negotiated plea agreement in an unrelated case. Although Petitioner failed to expeditiously sign the appropriate statement allowing for a voluntary dismissal of the appeal in case number 69596, the State was not without a remedy. First of all, the State could have insisted upon Petitioner voluntarily dismissing the appeal prior to taking advantage of the negotiated plea agreement in the unrelated case on August 15, 2002. Secondly, the State could have petitioned the trial court to either set aside the agreement in the unrelated cases or request specific performance of Petitioner’s agreement to abandon his appeal. *See State v. Howington*, 907 S.W.2d 403, 408 (Tenn. 1995) (agreement between a defendant and a prosecutor is contractual and can be enforced under the law of contracts); *see also Metheny v. State*, 589 S.W.2d 943, 945-46 (Tenn. Crim. App. 1979) (once a trial judge accepts the negotiated plea agreement, the agreement is treated as a contract and is enforceable as such).

Final action in Petitioner’s appeal from the trial court’s judgment in case number 69596 occurred in the Court of Criminal Appeals on October 27, 2003. Accordingly, Petitioner timely filed his petition for post-conviction relief within one year, having filed on October 6, 2004. Furthermore, the *pro se* petition meets the minimum requirements of stating a factual basis for relief as to the allegations of ineffective assistance of counsel, to the extent necessary to avoid summary dismissal upon preliminary consideration. *See* T.C.A. § 40-30-106 (2003). The trial court erred in summarily dismissing the petition.

CONCLUSION

For the stated reasons, the judgment of the post-conviction court summarily dismissing the petition is reversed. This case is remanded for entry of a preliminary order pursuant to Tennessee Code Annotated section 40-30-107 (2003) and for further proceedings consistent with this opinion and the Post-Conviction Procedure Act.

THOMAS T. WOODALL, JUDGE